

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

**JOHN BAX,**

**Petitioner,**

**-VS-**

**WARDEN, FCI MCKEAN,**

**Respondent.**

C.A. NO. 05-194

**JUDGE: MCLAUGHLIN**  
**MAGISTRATE: BAXTER**

CLERK  
U.S. DISTRICT

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1. **Introduction**

CONSOLIDATED MOTIONS FOR, AND BRIEFS IN SUPPORT OF:  
WITHDRAWAL OF JUDGE MCLAUGHLIN'S ORDER OF        /        /  
ADOPTING MAGISTRATE BAXTER'S REPORT AND RECOMMENDATION  
AND ENLARGEMENT OF TIME TO FILE OBJECTIONS TO SAME

NOW COMES John Bax, Pro Se (Petitioner); and hereby respectfully submits his Consolidated Motions and Briefs seeking this Honorable Court to Withdraw its Order of 8/22/06, Adopting Magistrate Baxter's Report and Recommendation (R&R) to Dismiss his pending habeas corpus petition (Petition). And additionally, seeks the Court to Enlarge the Time to file Objections to the R&R in order to entertain the Objections "filed" by Petitioner and presently on this Court's Docket.

As set forth more fully below, Petitioner "filed" his Objections in a timely manner by surrendering his Objections to the prison officials on August 15, 2006. See: Certificate of Service to Petitioner's Opposition to Magistrate Judge's [R&R], at 7; and

Houston v. Lack, 487 US 266 (1988) (holding that prisoner pleading surrendered to prison officials on date due was "timely filed"), and its progeny.

### JURISDICTION

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ...; (6) any other reason justifying relief from the operation of the judgement....

Federal Rules of Civil Procedure, Rule 60. (F.R.Cv.P).

**(b) Enlargement.** When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... or (2) upon motion made after expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; ....

F.R.Cv.P, Rule 6.

### PROCEDURAL BACKGROUND

Petitioner presently has pending Petition for Writ of habeas corpus in this Court. The Magistrate Judge Baxter had Issued a R&R suggesting the Dismissal of the Petition for lack of jurisdiction by the Court.

Petitioner had subsequently filed for, and was Granted, an Enlargement of Time to file his Objections as per 28 U.S.C. §636(b). The date for the filing of said Objections is/was August 18, 2006.

In compliance with the Court's Order Enlarging the Time; Petitioner had compiled his Objections and weighed them in the

on the prison law library's postal scale. He then affixed the proper postage, as per the scale, to both the Court's copy and the envelope containing the U.S. Attorney's copy.

Petitioner then proceeded to the prison official at the dining hall who was designated to receive inmate legal mail for mailing. The official accepted the envelopes and proceeded to mail them. Said date being August 17, 2006. See: Exhibit A, photocopy of the front and back of the envelope for the Court which was returned to the prison for insufficient funds.

Unfortunately, Petitioner did not get the returned mail from the prison officials until August 21, 2006, -- four (4) days after it was taken to the U.S. Postal Office and returned for lack of postage. So Petitioner immediately affixed the additional postage to the envelope and the prison officials re-mailed the envelope to the Court.

Petitioner would note for the Court that he did not receive the envelope back for the U.S. Attorney's Office; so the error in the postage by the prison law library scale was not great enough to cause that one to be returned.

But either way, Petitioner's pleading, to wit, the Objections to the R&R; had been, and were at all times, in the care and custody of the prison officials entrusted with prisoner mail. And same was initially surrendered before the due date for the pleading to be filed, hence it was "filed" on time unbeknownst to the Court.

#### DISCUSSION

Petitioner will not belabor this Honorable Court with an

extended argument for the Withdrawing of the Court's Adoption of the Magistrate's R&R and/or Enlargement of Time to File Objections. Same is so as this Court was unaware that the Petitioner had filed his Objections in a timely manner by surrender to the prison officials. Had the Court known and been in actual physical possession of said Objections, the Court could have undertaken the de novo review mandated by statute.

But as the Court was not in actual physical possession of the Objections, it inadvertently ruled on the R&R as unopposed by the parties. When, in fact, there were timely filed Objections by the most interested party -- to wit, Petitioner. But due to the failure of the prison postal scale, Petitioner's envelope was not affixed with sufficient postage to have same delivered to the Court. Had the scale properly advised Petitioner the needed postage, he would have affixed same. In fact, as soon as the prison officials informed him of same, he immediately affixed the additional postage and the officials forwarded the envelope to the Court. (As a side note, Petitioner has filed a Request to Staff at the Education Department seeking the inspection of the prison law library postal scale to insure its accuracy.)

Succinctly, Petitioner deems that the inadvertent Ruling by the Court on the pending R&R without Objections is inadvertent err and excusable neglect on both the Court and Petitioner. Notwithstanding same, the just and equitable thing to do is to rescind the Order of 08/22/06 and entertain the Objections "filed" by Petitioner and presently pending before the Court. This is so as either way, as per Supreme Court case law, Petitioner's pleading was, at all times, in the custody of the prison officials

and therefore "filed".

Rule 6(b) providing for enlargement of time after expiration of specified period where failure to act was result of excusable neglect must be liberally construed in order that litigant be given opportunity to be heard and given their day in court so that justice may be served. *Anderson v. Stanco Sports Library, Inc.* (1971, DC SC) 52 FRD 108, 15 FR Serv 2d 207.

USCS Federal Rules of Civil Procedure, Rule 6. Note 27. Construction.

In sum, as the Supreme Court has stated, the underlying principle is that Petitioner must be afforded his "one full bite of the apple of justice". Without same the entire American Jurisprudence is suspect and the abolishment of the traditional common law of pleading, for the more liberal and "user friendly" federal code and rules, would be for naught. Citations omitted for brevity.

In the alternative, and in conjunction with the above, Petitioner has included a Jurisdictional reference to the Rules of Civil Procedure Rule 6 for the Enlarging of prescribed time periods. This is so as the Court may find that it is necessary for the Enlargement of time to file the Objections in lieu of them being considered "filed" with the Court. Which, in and of itself, would also be an equitable and just handling of Petitioner's cause to have the Objections accepted and the statutory de novo review done. There is no justifiable reason for not granting an extension of time to file the referenced Objections post-due date.

Petitioner submits that had he become aware of the actual shortage of postage on his filing the date it was taken to the post office, or the next day, he could have timely filed a Motion for Enlargement of Time to file his Objectinos and same would

have been Granted as it would have been a request for a minimal extension. See: Exhibit A, Petitioner's signature and receipt date of 08/21/06, when returned to him. (Upper right-hand corner under postage). But Petitioner was not able to file for an additional extension merely because he was not aware that he required same.

### CONCLUSION

In sum, Petitioner now comes before the Court in a timely manner and pursuant to the Federal Rules of Civil Procedure seeking the Court to entertain his timely filed statutorily enjoined Objections. And Petitioner submits that the equitable and just manner to deal with his request is to Grant his request to Withdraw the Court's Order of August 22, 2003, and accept the (unbeknownst) timely filed Objections to Magistrate Judge Baxter's Report and Recommendation.

And should the Court deem necessary, because of the excusable neglect of lack of postage due to misdirection of prison law library scale direction(s), Enlarge the Time to File the Objections in order to accept them. This will allow the Court to overlook the err in light of uncontrollable circumstances -- or at least outside the control of Petitioner -- of not affixing enough postage and the pleading being returned to Petitioner.

WHEREFORE PETITIONER PRAYS, that the Honorable Sean J. McLaughlin will Grant his Motion to Withdraw the Court' Order of August 22, 2006, and accept his Objections as presently filed with the Court and conduct the de novo review pursuant to statute.


AND FURTHER MORE, Grant Petitioner any additional Relief

the Court deems just and proper.

Respectfully Submitted,

**DECLARATION**


I, John Bax, hereby declare and affirm, under the penalty of perjury pursuant to 28 U.S.C. §1746(2), that the foregoing pleading is true and correct to the best of my knowledge, recollection and belief, this 24th day of August, 2006.

  
\_\_\_\_\_  
John Bax, Pro Se  
Fed. Reg. No. 07328-067  
FCI McKean  
P.O. Box 8000  
Bradford, PA 16706

**CERTIFICATE OF SERVICE**

I, John Bax, hereby certify that I served, by first-class postage prepaid surrender to the prison officials, true and correct Originals of the foregoing pleadings and accompanying Declaration, this 24th day of August, 2006, to:

- |                       |                         |
|-----------------------|-------------------------|
| 1. Clerk of the Court | 2. Gregory Melucci      |
| U.S.D.C. for W.D. PA  | Asst. U.S. Attorney     |
| P.O. Box 1820         | 700 Grant St., Ste. 400 |
| Erie, PA 16501        | Pittsburgh, PA 15219    |

  
\_\_\_\_\_  
John Bax, Pro Se  
Fed. Reg. No. 07328-067  
FCI McKean  
P.O. Box 8000  
Bradford, PA 16701

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INTERNATIONAL PHARMACEUTICALS  
(ADDRESSING PHARMACEUTICALS)

~~SECRET~~

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Ex - A

nor

BRADFORD, PA. 16801 has been processed and returned to you. The enclosed letter was neither processed nor returned to you. The letter raises a question or problem of which you may wish to return the material for forwarding. If the writer raises a question or problem of which you may wish to return the material for forwarding, please return this facility has jurisdiction over the matter. If the writer addresses a question or problem of which you may wish to return the material for forwarding, please return this facility has jurisdiction over the matter. If the writer addresses a question or problem of which you may wish to return the material for forwarding, please return this facility has jurisdiction over the matter.



John Bax  
Fed. Reg. No. 07328-067  
FCI McKean  
P.O. Box 8000  
Bradford, PA 16701

August 24, 2006

Clerk of the Court  
U.S.D.C. for W.D. PA  
P.O. Box 1820  
Erie, PA 16501

RE: JOHN BAX V. WARDEN, FCI MCKEAN, C.A. #05-194.

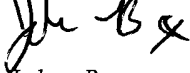
Dear Sirs:

Please find enclosed my Consolidated Motions for Withdrawing Judge McLaughlin's Order of 08/22/06 and Enlargement of Time to File Objections.

I believe that you will find everything that you need, including the Exhibit A to the Motion. Should you find that you require more, please contact me at the above address.

As always, I thank you for your time and efforts in assisting me in staying prompt and timely before the Court.

Sincerely,

  
John Bax

enc. YES

cc. FILE; U.S. ATTORNEY.